No. 90-1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CENTRAL STATES MOTOR FREIGHT BUREAU, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioners file this brief in reply to the brief in opposition (Res. Br.), served July 29, 1991, in which respondents raise an argument concerning the application of the National Rail Transportation Policy (49 USC §10101a) to the independent motor carrier transportation at issue in this case (Res. Br. 9).

A. Background

Petitioners argued to the court below and to this Court (Pet. 14-16) that by enacting 49 USC §10505(a) and (f), Congress clearly limited ICC exemption of continuous intermodal movements like TOFC and

COFC transportation to rail-provided service. In the opinion below (App. A to Pet.), the court of appeals rejected petitioners' argument and held that Congress did not directly and unambiguously express its intention to so limit the ICC's exemptive reach.

On petition to this Court, petitioners maintained, *inter alia*, that a reading of §10505(a), even in isolation from §10505(f), shows it does not apply to the independent motor carriage involved here because §10505(a) authorizes the ICC to grant an exemption only when "the application of a provision of [subtitle IV of Title 49 USC] is not necessary to carry out the transportation policy of section 10101a of this title . . . ." We contended that §10101a, the National Rail Transportation Policy (NRTP), cannot logically be applied to non-rail-provided motor carrier transportation (Pet. 17).

Respondents answer that, because of the close relationship between the motor and rail portions of TOFC and COFC movements, it was legitimate for the ICC to decide to deregulate motor carrier-provided TOFC/COFC service by reference to the NRTP, "just as Congress directed in Section 10505(a)." (Res. Br. 9). Respondents state:

> Deregulation of motor carrier-provided TOFC/COFC traffic is closely related to the National Rail Transportation Policy because that traffic fills an integral role in the market for rail freight services, by making those services available at competitive rates to customers who cannot deliver their freight to rail stations. (*Id.*)

B. Argument

Respondents' rationale for the use of the NRTP is in error. There is nothing in the plain language of §§10101a and 10505(a) or in their legislative histories to suggest that Congress directed or intended the NRTP to be the basis for truck deregulation.

Until 1980, Congress maintained a single National Transportation Policy, which applied to both rail and motor carriers and to other transportation modes. The policy was first declared in the Transportation Act of 1940, 54 Stat. 899, and was inserted before Part I of the Interstate Commerce Act [ICA], 49 USC, preceding §§1 [rail carriers], 301 [motor carriers], 901 [water carriers], and 1001 [freight forwarders], as the title was numbered prior to 1978. The text of the policy as enacted in 1940 is set forth in *Appendix A* to this brief.

When §10505(a) was enacted in its original form by §207 of the Railroad Revitalization and Regulatory Reform Act of 1976 [the 4-R Act], P.L. No. 94-210, 90 Stat. 31, codified at 49 USC §12(1)(b), Congress directed the ICC to deregulate rail-related matters but established as a mandatory criterion that the exempted activity must not be "necessary to effectuate the national transportation policy declared in this act." As noted, the policy at that time embraced both rail and motor carriers. The text of §10505(a), as enacted in 1976, is set forth in *Appendix B* to this brief.

In 1978, Congress, in the Revised Interstate Commerce Act, Pub. L. 95-473, 92 Stat. 1337, revised, codified, and enacted without substantive change various transportation laws as Title 49,United States Code. New 5-digit section numbers were adopted. The

National Transportation Policy was reworded slightly and placed in §10101, under the heading "Transportation policy." 92 Stat. 1337-38. It continued to apply to all modes.[1] The Revised Act placed the ICC's authority to exempt rail transportation, formerly in §12(1)(b), in §10505(a). 92 Stat. 1360-61. The criterion in §10505(a) concerning the national transportation policy was undisturbed, except that reference was now to §10101. The text of §§10101 and 10505(a), as enacted in 1978, is set out in *Appendix C* to this brief.

The Staggers Rail Act of 1980, P.L. No. 96-448, 95 Stat. 1895, worked a fundamental change in the national transportation policy and in the relationship of that policy to the exemptive reach of §10505(a). Section 3 of the Staggers Act, 95 Stat. 1897-98, divided the national transportation policy, limiting the application of §10101 to non-rail modes, including motor carriers, and creating new §10101a, the NRTP, applicable to rail transportation. The present text of §§10101 and 10101a, which has not been modified since 1980, is set out in *Appendix D* to this brief. Section 213 of the Staggers Act, 94 Stat. 1912-13, modified §10505(a) so that the ICC was empowered to deregulate rail-related matters only if continued regulation was not necessary to carry out the new *rail* policy set forth in §10101a. The present text of §10505(a) is set out as *Appendix E* to this brief.

Thus, beginning in 1980, Congress declared two transportation policies, one for motor carriers and

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[1] In §10101, the words "the policy of the United States Government" were substituted for "The national transportation policy of the Congress," contained in the policy as originally written, "since the policy has been enacted into law." H.Rep. No. 95-1395, at 13, Vol. 4, 1978 U.S. Code Cong. & Adm. News 3022.

modes other than rail and a different policy for rail carriers. The new rail policy was tied specifically to the rail industry and rail transportation, as evidenced by the standards set out in §10101a itself and by the goals enumerated in §3 of the Staggers Act.[2] Section 10505(a), which theretofore had referred to an undivided transportation policy, now tied deregulation pursuant to that section to the rail industry.

It is anomalous to suggest that Congress, having created the NRTP and having restricted the application of §10505(a) to that policy, intended that section and that policy to be the basis for the deregulation of motor carrier transportation which is not provided by the railroad. Respondents state that motor carrier-provided TOFC/COFC traffic makes rail services available at competitive rates to shippers who cannot deliver their freight to rail stations (Res. Br. 9). This claim, unsupported by record citation, cannot

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[2] "The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—

(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;

(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;

(3) to assist the rail system to remain viable in the private sector of the economy;

(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and

(5) to assist in the rehabilitation and financing of the rail system."

overcome the clear intent of Congress to apply §10505(a) to the rail industry only.

Language from a recent decision of the ICC supports petitioners' reading of §10505 and the NRTP:

> Section 10505 was enacted as part of legislation that substantially lessened government regulation of the *rail industry*, and it constitutes a broad directive to this agency to identify and carry out further deregulatory initiatives.[6]

---

[6] Section 10505 contains a strong Congressional mandate; by its terms (specifically, its use of the word "shall," rather than "may") it requires the Commission to deregulate the *rail industry* whenever the exemption criteria are met. Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by *rail carriers* will be removed through the use of §10505 and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980).

Implementation of Environmental Laws, 7 ICC 2d 807, 809 (1991) (emphasis added; original emphasis of the word "requires" deleted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

National Transportation Policy [1940]

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001*]. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPENDIX B

49 U.S.C. § 12(1)(b) [1976] Authority and duties of The Commission

Whenever the Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this part, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order. The Commission may, by order, revoke any such exemption whenever it finds, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part to the exempted person, class of persons, services, or transactions, to the extent specified in such order, is necessary to effectuate the national transportation policy declared in this Act and to achieve effective regulation by the Commission, and would serve a useful public purpose.

APPENDIX C

49 U.S.C. § 10101 [1978] Transportation policy

(a) To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

APPENDIX D

49 U.S.C. §10101[1980]. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a va-

riety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out

49 U.S.C. § 10101a.[1980] Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require

fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

((9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

APPENDIX E

49 U.S.C. § 10505(a) [1980] Authority to exempt rail transportation

In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.